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No. 80-2008

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal internal revenue protection regulation, which prescribes certain liquor bottle sizes for use by distilled spirits taxpayers and prohibits all other sizes, is contrary to the Twenty-first Amendment because it overrides a state law that expressly permits, only for intrastate purposes, the use of a bottle size not permitted by the federal regulation.

2. Whether the challenged bottle-size regulation is reasonably related to the collection of revenue.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is not reported. The decision of the district court (Pet. App. 17a-47a) is reported at 488 F. Supp. 156.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1981, and a petition for rehearing was denied on March 4, 1981 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. The Twenty-first Amendment to the Constitution provides in pertinent part:

> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. Section 5301(a) of the Internal Revenue Code of 1954 (26 U.S.C. (1970 ed.)), provides in pertinent part:

> Whenever in his judgment such action is necessary to protect the revenue, the Secretary or his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—
>
> > (1) to regulate the kind, size, branding, marking, sale, resale, possession, use and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits * * *.

3. 27 C.F.R. 201.540b (1977) provides:

> Liquor bottles shall conform to the applicable standards of fill provided in Subpart E of 27 C.F.R. Part 5, including those for liquor bottles of less than 200 ml. capacity. The use of any bottle size other than as authorized in Subpart E of 27 C.F.R. Part 5 is prohibited for the packaging of distilled spirits for domestic purposes, except that 4-ounce liquor bottles may be used through December 31, 1979, for packaging any distilled spirits, other than spirits bottled in bond after determination of tax, on bottling premises for sale in intrastate commerce only.

4. 27 C.F.R. 5.47a(a) provides:

> *Authorized standards of fill.* On or after January 1, 1980, the standards of fill for all distilled spirits, whether domestically bottled or imported, shall be as follows:
>
> | | |
> |---|---|
> | 1.75 liters | 500 milliliters |
> | 1.00 liter | 200 milliliters |
> | 750 milliliters | 50 milliliters |

STATEMENT

1. The Secretary of the Treasury is authorized, "[w]henever in his judgment such action is necessary to protect the revenue, * * * to regulate the * * * size * * * of containers * * * use[d] for the sale of distilled spirits * * *." Section 5301(a) of the Internal Revenue Code of 1954 (26 U.S.C. (1970 ed)).[1] Since 1934, the Secretary has periodically issued regulations prescribing permissible bottle sizes pursuant to this authority (Pet. App. 22a).[2]

In 1976, after notice and comment (Pet. App. 23a-24a), the Secretary adopted the bottle-size regulation at issue here (41 Fed. Reg. 46862 (1976)). Among other things, this regulation prohibited, as of December 31, 1979, the use of four-ounce bottles that had, until then, been permitted for distilled spirits, except those bottled in bond (Pet. App.

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[1]The Secretary has been authorized to regulate the size of liquor bottles since 1934. See H.R.J. Res. 370, 48 Stat. 1020; Internal Revenue Code of 1939, ch. 2, Section 2871, 53 Stat. 331; Internal Revenue Code of 1954, Section 5214 (26 U.S.C. (1952 ed., Supp. V)); Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, Title II, Section 201, 72 Stat. 1374.

[2]See, *e.g.*, 5 Fed. Reg. 1246 (1940); 20 Fed. Reg. 2707 (1955); 29 Fed. Reg. 14362 (1964); 33 Fed. Reg. 6816 (1968); 41 Fed. Reg. 46862 (1976); 44 Fed. Reg. 71676 (1979).

23a).[3] Petitioners did not avail themselves of the opportunity to participate in the rulemaking proceedings (Pet. App. 24a). On November 16, 1979, some three years after the rulemaking proceedings, the Comptroller of the Treasury of the State of Maryland adopted a regulation that authorized the use of four-ounce liquor bottles "for intra-state purposes only" (Pet. App. 27a).

2. On November 20, 1979, four days after the adoption of the Maryland regulation, petitioners brought this action in the United States District Court for the District of Maryland, claiming that the new federal bottle-size regulation violated the Twenty-first Amendment, or, in the alternative, that the regulation was not authorized by law (Pet. 3). Asserting that the federal regulation had been promulgated under the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*, a statute petitioners maintained was enacted pursuant to the Commerce Clause, rather than under a statute enacted pursuant to the taxing power, petitioners claimed that the regulation exceeded the constitutional limits of federal liquor regulation (Pet. 3). Petitioners further claimed that, even if the regulation had been promulgated under a taxing power statute, it was nonetheless unauthorized because it is of "no assistance in collecting liquor taxes, [and] * * * bears no reasonable relation to the protection of the revenue, and that there is therefore no statutory authority for its promulgation" (Pet. App. 40a). By agreement of the parties, the regulation was held in abeyance pending the decision of the district court (*id.* at 18a).

The district court sustained the constitutionality of the regulation, holding that it "passes muster despite the Twenty-first Amendment" and "is reasonably related to the

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[3]The challenged regulation has been amended, renumbered and codified at 27 C.F.R. 19.632. See also 46 Fed. Reg. 32225 (1981).

collection of the revenue" (Pet. App. 47a). Petitioners thereafter moved the district court for entry of an injunction pending appeal, and that motion was granted (*id.* at 4a-15a). The court of appeals affirmed on the merits and adopted the opinion of the district court (Pet. App. 1a-2a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the present controversy has lost its vitality because the Secretary has amended the regulation at issue, and has provided administrative relief that is essentially the same as that which petitioners seek in this litigation. Further review is therefore unwarranted.

1. On June 19, 1981, in response to a petition for rulemaking that was submitted by one of the petitioners, the Secretary promulgated a temporary regulation permitting the use in intrastate commerce of a 100 milliliter (approximately 3.4 ounces) liquor bottle. See 46 Fed. Reg. 32224 (1981) ("This amendment is necessary to enable small distilled spirits plants which rely heavily on bottling the 4 ounce container to remain in business"). The Secretary also has invited comments on the question whether this temporary rule should be made permanent (*ibid.*). By regulation, therefore, petitioners have obtained relief that is essentially the same as that which they have sought in this litigation, and any decision that this Court might render in this case would therefore be essentially advisory in nature and without practical importance.

2. At all events, the decision below is correct, and, contrary to petitioners' assertions (Pet. 7-18), does not conflict with any decision of this Court or of any other court of appeals. The cases upon which petitioners rely are simply inapposite because the questions whether and to what extent Congress' taxing powers are limited by the Twenty-

first Amendment were not at issue in any of those cases. Moreover, the decision below is consistent with prior decisions of this Court, which, although not involving Congress' taxing power, "have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause" and show that "[o]nce passing beyond * * * the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). Neither this Court nor any other court has held that the Twenty-first Amendment was intended to limit Congress' powers either to tax liquor or to authorize the Secretary to adopt reasonable liquor tax collection regulations. Finally, as the courts below properly determined, the regulation at issue is authorized by the Internal Revenue Code and is reasonably related to the protection of the revenue (Pet. App. 2a, 40a-47a). Any incidental effect that the challenged rule might have in regulating the flow of commerce is permissible. See *United States* v. *Sanchez*, 340 U.S. 42 (1950).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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